

STATE OF MICHIGAN
COURT OF APPEALS

LORI BARNETT-SMITH, Individually and as,
Personal representative of the Estate of LORNA
BARNETT, Deceased,

Plaintiff- Appellant,

v

WILLIAM BEAUMONT HOSPITAL and
SANFORD H. KOLTONOW, M.D.,

Defendants-Appellees.

UNPUBLISHED
October 28, 1997

No. 194427
Oakland Circuit Court
LC No. 94-473288-NH

Before: Saad, P.J., and O'Connell and Matuzak*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's judgment in favor of defendant William Beaumont Hospital (hereinafter defendant)¹ and the order of the circuit court denying plaintiff's motion for new trial. We affirm.

Plaintiff first argues that the trial court erred by striking the testimony of Dr. Heuser, her expert cardiologist.² The facts surrounding the attempts to schedule the deposition of Dr. Heuser are not significantly disputed by the parties. The trial court's discovery order provided that all depositions must occur prior to December 18, 1995.³ Plaintiff did not provide defendant with any dates for her expert depositions by December 1, 1995. Therefore, defendant served plaintiff with notices on or about December 1, 1995⁴ for all of plaintiff's experts' depositions, with the dates arbitrarily set by defendant. The first of these dates, December 7, 1995, was canceled by plaintiff. However, plaintiff did indicate on December 6, 1995 that there was a possibility that Dr. Heuser would be available on December 11, 1995, for his deposition. On December 7, 1995, plaintiff confirmed that Dr. Heuser was available for a deposition on December 11, 1995 in Phoenix, Arizona. Plaintiff then notified defendant for the first time that as a prerequisite to Dr. Heuser's deposition, defendant must pay Dr. Heuser \$3,000 in advance for his time. Defendant filed a motion to strike all plaintiff's experts who had not been produced for their

* Circuit judge, sitting on the Court of Appeals by assignment.

depositions for failure to comply with the prior court order that the depositions occur prior to December 18, 1995.

The trial court heard defendant's motion to strike plaintiff's experts on December 20, 1995. The trial court ordered that Dr. Heuser be paid no more than \$350 per hour for his deposition time and that the time for taking these depositions be extended to the January 15, 1996 trial date.⁵ Plaintiff's counsel provided defendant with three dates for Dr. Heuser's deposition, which was to be taken in Phoenix, Arizona. Defendant noticed the deposition for one of the provided dates, January 9, 1996. Plaintiff's counsel subsequently canceled the deposition and requested that defendant reschedule it to January 16, 1996. Defendant rescheduled and renoticed the deposition for January 16, 1996. When defense counsel's secretary called on January 12, 1996, to confirm the deposition scheduled for January 16, 1996, she was informed that the deposition would not go forward. Plaintiff's counsel's office subsequently called and offered Dr. Heuser for deposition on January 15, 1996. Defense counsel had other matters scheduled and was unavailable to travel to Arizona to take the deposition on January 15, 1996. Immediately prior to the start of trial, plaintiff's counsel served notice for the bene esse deposition of Dr. Heuser in Phoenix, Arizona on Saturday, January 20, 1996.

When trial started on January 18, 1996, defense counsel moved to quash the deposition of Dr. Heuser. Defense counsel complained that it was unfair to begin trial without first having had the opportunity to take Dr. Heuser's deposition. The trial court agreed and ordered that Dr. Heuser would not be permitted to testify.

This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 450; 540 NW2d 696 (1995). As this Court explained in *Model Laundries & Dry Cleaners v Amoco Corp.*, 216 Mich App 1, 4; 548 NW2d 242 (1996), "[a]n abuse of discretion exists only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias." *Id.* (quoting *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 [1990]).

This court finds no abuse of discretion in the trial court's decision to bar plaintiff's cardiologist expert from testifying at trial. The trial court's orders of December 8, 1995 and December 20, 1995 placed plaintiff on notice that her expert had to be produced for a discovery deposition. Although plaintiff's expert was apparently available for deposition on several occasions within the time frame ordered by the court, plaintiff failed to produce her expert for deposition, thereby violating both of the court orders.⁶ While we note that on one occasion the deposition did not take place because of defense counsel's unavailability, this Court does not consider that instance a constructive offer given that defendant was given but three days notice for a deposition that was to take place in Arizona. We also find that defendant was prejudiced in its ability to prepare for trial by not being able to take the deposition of plaintiff's expert prior to trial. Therefore, considering the circumstances of this case, we conclude that the trial court did not abuse its discretion.

Plaintiff next argues that the trial court erred by striking the testimony of her pathologist regarding issues related to cardiology, by excluding the testimony of her damage expert, and by refusing to allow plaintiff to make a special record regarding both experts. We disagree.

A trial court's decisions regarding the qualification of a witness as an expert and the admissibility of the witness's testimony will not be reversed absent an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989); *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702; *Mulholland, supra* at 403. The critical inquiry is whether the expert testimony will assist the factfinder in making the ultimate determination in the case. MRE 702; *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990).

First, we find that the trial court's ruling with regard to the testimony of plaintiff's pathologist was justified. The trial court determined that plaintiff did not lay a proper foundation to justify the court's recognition of her pathologist as an expert in cardiology issues. The pathologist testified that he was a forensic pathologist and neuropathologist and that he was a specialist in the determination and cause of the manner of death. Plaintiff was not able to show, however, that her expert had the necessary foundation to provide an expert opinion in cardiology issues unrelated to the determination and cause of the manner of death of decedent. Plaintiff's pathologist was not the appropriate person to discuss symptoms and treatment of cardiology problems.

Second, the trial court did not abuse its discretion in disallowing the testimony of plaintiff's damage expert. In striking the testimony, the trial judge reasoned that the testimony would not be helpful to the jury in making the ultimate decision in the case because the expert's opinion was too speculative to be relied upon in determining damages. We agree. Contrary to plaintiff's assertion on appeal, the trial court offered plaintiff the opportunity to make a special record and plaintiff did so. The record indicates that the decedent's only employment was from 1986 to 1990, and that she had not been employed during the two-and-one-half years prior to her death despite the fact that she had received a certificate from a vocational school to work in the medical profession. Although decedent applied for a job at a local hospital, it was unclear whether the position was for volunteer work or for employment. Based on this information, it is speculative whether decedent would have sought and obtained a job.

Plaintiff's last argument is that the trial court erred in refusing to provide the jury with the statutory mortality table. We disagree.

The determination regarding whether an instruction is accurate and applicable in light of the characteristics of a particular case is in the sound discretion of the trial court. *Williams v Coleman*, 194 Mich App 606, 623; 488 NW2d 464 (1992). A properly requested standard jury instruction must be given if it accurately states the law and is applicable to the case. MCR 2.516(D)(2); *Luidens v 63rd Dist Court*, 219 Mich App 24, 27; 555 NW2d 709 (1996). However, a court can refuse to give a generally applicable instruction if the instruction is not supported by the facts of a particular case or if the instruction would not enhance the ability of the jurors to decide the case "intelligently, fairly, and impartially." *Sells v Monroe County*, 158 Mich App 637, 649; 405 NW2d 387 (1987).

The trial court properly refused to give the instruction requested by plaintiff (SJI2d 53.02, "Statutory Mortality Table -- Death Case"). Instructions relating to the Statutory Mortality Table (SJI2d 53.01, 53.02 [previously SJI 34.01, 34.02]) are not admissible for a plaintiff who is not in

an average, normal, healthy condition. *Carbonnell v Bluhm*, 114 Mich App 216, 225; 318 NW2d 659 (1982) (citation omitted); *Fortner v Koch*, 272 Mich 273, 279; 261 NW 762 (1935). Plaintiff notes that in *Jenkins v Canfield*, 282 Mich 277; 276 NW 447 (1937), the Supreme Court upheld the trial court's decision to provide the jury with the mortality table despite the fact that the plaintiff had suffered from previous illness. However, plaintiff ignores the fact that a dispute existed as to whether the plaintiff in *Canfield* was in average good health, raising an issue of fact to be determined by the jury. *Id.* at 279. The present case is distinguishable in that there was ample evidence presented to support the position that decedent was not a normal, healthy, woman at the time of her death. It was undisputed that she had suffered a prior myocardial infarction. Moreover, evidence was presented that she was grossly overweight and that she had diabetes. Plaintiff presented no evidence that decedent was a normal healthy woman and that SJI 53.02 was applicable to a woman in her condition. Therefore, the trial court did not abuse its discretion in refusing to instruct the jury on the Statutory Mortality Table.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Michael J. Matuzak

¹ Defendant Sanford H. Koltonow, M.D., was dismissed from this matter by stipulation and order dated March 6, 1996.

² The lower court record reveals, however, that the trial court did not strike Dr. Heuser's testimony. Rather, the court ordered that Dr. Heuser not be permitted to testify.

³ The trial court issued this ruling from the bench on November 29, 1995. An order to this effect was entered on December 8, 1995.

⁴ While defendant states that the notices of depositions were served on December 1, 1995, plaintiff asserts that the notices were received by plaintiff on December 2, 1995.

⁵ The court's order was entered on January 2, 1996.

⁶ Plaintiff argues that cancellation of the first deposition was defendant's fault due to defendant's objection to the cardiologist's fee. However, we note that the trial court also found the fee to be excessive. We do not find the trial court's decision to be an abuse of discretion.